STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
	)	
-vs-	)	
	)	
Illinois Bell Telephone Company	)	
	)	**06-0027**
Investigation of specified tariffs declaring certain services to be competitive telecommunications services.	)	

INITIAL BRIEF

OF THE

COOK COUNTY STATE'S ATTORNEY'S OFFICE

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I. Summary of Position

The Cook County State's Attorney's Office ("CCSAO") is seeking reversal of the competitive classification of the tariffs that are the subject matter of this case. The Illinois Public Utilities Act's requirements for reclassification have not been met in this case. Residential consumers in MSA1 do not have the range of competitive options envisioned by the Public Utilities Act before the Commission should approve a competitive declaration.

While the hearing in this case appears to show a variety of options for telecommunications customers, they do not rise to the reasonableness in pricing, level, or type in each part of MSA1 for the services in the tariffs to be competitive within the meaning of the Public Utilities Act. For all customers in MSA1, there are not functionally equivalent services reasonably available. Further, the reclassification is not in the public interest. The CCSAO is requesting that the tariffs that are the subject of this case be classified as noncompetitive.

While we did not sponsor a witness in the initial hearing case, we urge the Commission to follow the recommendations of Dr. Lee Selwyn who testified on behalf of the Illinois Attorney General's Office. Dr. Selwyn did testify on behalf of the CCSAO and others with respect to the Joint Proposal. The CCSAO does not intend to address all the issues raised by this case and the fact that we have not argued various issues is not intended to indicate that the Act has been complied with.

II. Overview: Statement of Facts

On November 10, 2005 Illinois Bell Telephone Company filed tariffs classifying various services as competitive as of November 11, 2006. As noted in the Illinois Commerce Commission's Order:

> "…The tariffs classify as competitive for all residential customers in MSA 1 (a/k/a the Chicago, Illinois LATA) network access lines, ISDN Direct lines, local usage, selected optional features, directory listing services, billing services and selected packages. The Company also classified for all Residential customers in MSA 1 certain packages containing combinations of specified services and combinations of services previously classified as non-competitive and services previously classified as competitive…"
> ICC Order at 1, 06-0027, e-docket January 11, 2006.

The Commission opened an investigation and noted"…that, pursuant to Section 13-502 of the Public Utilities Act, an investigation is initiated into whether the classification as competitive of the services provided by Illinois Bell Telephone Company pursuant to the tariff sheets listed in Appendix A is proper…" ICC Order at 5, 06-0027, e-docket January 11, 2006.

A hearing was held in April 2006 on this matter. Testimony was presented on behalf of AT&T Illinois, the Staff of the Illinois Commerce Commission, the Illinois Attorney General's Office, the Citizens Utility Board, and Data Net Systems. The Cook County State's Attorney's Office cross-examined some of the witnesses at the hearing. While the CCSAO did not file testimony in this case the office supports the views presented in the testimony of Dr. Lee Selwyn who testified on behalf of the Illinois Attorney General's Office.

Ultimately, AT&T Illinois and CUB agreed to a Stipulation and Joint Proposal for the Commission to consider. See AT&T Illinois Ex 1.4, Schedule WKW-JP1. On June 5-6, 2006 a hearing was held on the joint proposal. With respect to the joint proposal testimony was presented on behalf of AT&T Illinois; the Staff of the Illinois Commerce Commission; the Illinois Attorney General's Office, the Cook County State's Attorney's Office, AARP; the Citizens Utility Board; and Data Net Systems. The CCSAO opposes the Joint Proposal.

III. Argument

a. Section 13-502 and Related Issues

The Public Utilities Act provides for tariffed telecommunications services provided by telecommunications carriers to be classified as competitive or noncompetitive. 220 ILCS 5/13-502(a). The Act goes on to provide when a service is considered competitive and states:

> A service shall be classified as competitive only if, and only to the extent that, for some identifiable class or group of customers in an exchange, group of exchanges, or some other clearly defined geographical area, such service, or its functional equivalent, or a substitute service, is reasonably available from more than one provider, whether or not any such provider is a telecommunications carrier subject to regulation under this Act.
> 220 ILCS 5/13-502(b).

The Act gives the Commission the authority to investigate the propriety of any classification of a telecommunications service. With respect to the burden of proof, the Act states: "…In any hearing or investigation, the burden of proof as to the proper classification of any service shall rest upon the telecommunications carrier providing the service…" 220 ILCS 5/13-502(b). Further, the Public Utilities Act provides that:

> (c) In determining whether a service should be reclassified as competitive, the Commission shall, at a minimum, consider the following factors:
>
> (1) the number, size, and geographic distribution of other providers of the service;
>
> (2) the availability of functionally equivalent services in the relevant geographic area and the ability of telecommunications carriers or other persons to make the same, equivalent, or substitutable service readily available in the relevant market at comparable rates, terms, and conditions;
>
> (3) the existence of economic, technological, or any other barriers to entry into, or exit from, the relevant market;
>
> (4) the extent to which other telecommunications companies must rely upon the service of another telecommunications carrier to provide telecommunications service; and
>
> (5) any other factors that may affect competition and the public interest that the Commission deems appropriate.
>
> 220 ILCS 5/13-502(c).

After considering those factors and the record evidence before it, we contend that the Commission should ultimately reverse the various competitive reclassifications and conclude that the tariffs before the Commission should be reclassified as noncompetitive.

The Illinois Appellate Court considered the interpretation of Section 13-502 in *MCI Telecommunications Corporation v. The Illinois Commerce Commission et al.*, 168 Ill. App. 3d 1008, 523 N.E.2d 143 (1st Dist. 1988). In *MCI* the court stated:

> Considered in the context of its legislative findings and policy declarations, section 13 -- 502 of the Act was correctly interpreted by the Commission to authorize reclassification of AT&T's statewide long distance service as competitive, on the ground that alternatives to AT&T's long distance service are actually available to a majority of access line customers in this State. Section 13 -- 502(b) calls for "reasonable availability" of alternatives to AT&T's long distance service. Because of the legislature's specification that such availability be "reasonable," we cannot agree with MCI's position that the Act requires total, complete, absolute equality in the quality,

> quantity, or degree of availability of those alternatives in comparison to AT&T's long distance service. 168 Ill. App. 3d at 1014.

This seems to provide the Commission with discretion. Ultimately, we hope the Commission will use its discretion to protect consumers.

NATURE OF THE EVIDENCE

In looking to the testimony provided by AT&T through its witness Wardin, the Commission needs to determine the witnesses basis of knowledge whether there is improper reliance on hearsay. While the Administrative Law Judge overruled the CCSAO's objection focusing on the admission of Wardin's direct and rebuttal testimony, the Commission should decide this issue independently. See: Transcript, April 4, 2006 at 305-307; April 5, 2006 at 598-599. The Commission needs to determine if the type of material in Mr. Wardin's testimony is the type of material that an expert in the field would reasonably rely on. In *Wilson v. Clark*, the Illinois Supreme Court adopted Federal rules of evidence 703 and 705. 84 Ill. 2d 186, 194, 417 N.E.2d 1322, 1981 Ill. LEXIS 244, 49 Ill. Dec. 308 (1981). The rules have been interpreted to allow opinions based on facts not in evidence. However, care needs to be taken to ensure that facts or data that the expert is relying on is: "…If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence" *Fed. R. Evid. 703*.…" The CCSAO contends that the wholesale importing into this case by Mr. Wardin of the data and testimony of the competitors in the market is improper.

While the Commission's rules of practice provide some flexibility with respect to the admission of evidence, what AT&T has done in Mr. Wardin's testimony has gone too far. The Commission's Rules of Practice provide the following on evidence:

> *"…In contested cases, and licensing proceedings, the rules of evidence and privilege applied in civil cases in the circuit courts of the State of Illinois shall be followed. However, evidence not admissible under such rules may be admitted if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs.* [5 ILCS 100/10-40]…"
> 83 Ill.Admin. Code Section 200.610.

The CCSAO contends that reasonably prudent persons in the conduct of their affairs would not rely on some of the types of evidence included in Mr. Wardin's testimony with respect to AT&T's various competitors. To the extent that AT&T Illinois was trying to show services available from other providers to meet its burden of proof, it should have produced testimony from those providers or other admissible evidence to meet the various requirements of the Public Utilities Act for a service to be properly classified as competitive. If the Commission believes that the ALJ properly admitted Mr. Wardin's testimony, then in light of the type of evidence AT&T Illinois relies on the Commission should consider that in deciding what weight to give the various data included.

GENERAL SECTION 13-502 ISSUES

The CCSAO contends that the Commission should find that wireless service and VoIP service has not been proven to be "…such service, or its functional equivalent, or a substitute service…" 220 ILCS 5/13-502(b). It is interesting to note that Dr. James Zolnierek indicated that he did not consider the effects of wireless or VoIP in his analysis. When asked why he noted:

> I do not consider the effects of either VoIP or wireless competitors on the market because, as has been seen, I am able to determine that the market for package offerings is competitive through analyzing competing wireline offerings. Accordingly, an extended analysis of VoIP or wireless competition is unnecessary. ICC Staff Ex. 2.0 (Zolnierek) at 98, lines 2099-2104.

Further, Dr. James Zolnierek recommended that the Commission not reach any conclusion regarding the propriety of including VoIP or wireless in a 13-502 analysis. ICC Staff Ex. 2.0 (Zolnierek) at 98, line 2106 – at 100 line 2145.

As noted by Dr. Selwyn "…Similarly, wireline and wireless phones may substitute for one another as *secondary* telephone lines (e.g., for "teen lines"), but the vast majority of consumers may not view them as providing "reasonable interchangeability of use" as their primary residential telephone service…" AG Ex. 1.0 (Selwyn) at 14, lines 23-26. Clearly, the Commission needs to recognize the differences.

CUB Witness McKibbin testified that wireless cannot support AT&T's declaration that Residential Local Usage and the Residential Network Access line are competitive services. CUB Ex. 1.0 (McKibbin) at 25-26. McKibbin also indicated that customers will not find that VoIP service is functionally equivalent or a substitute for AT&T's residential local Usage and the residential network access line. CUB Ex. 1.0 (McKibbin) at 29-34.

Ultimately, wireline service should be judged based on other wireline providers. The Commission should narrowly interpret the provisions of Section 13-502 to protect residential consumers.

It is not the responsibility of the various parties to meet AT&T's burden of proof in this case. The Commission should find that AT&T Illinois has not met its burden of proof in this case and should conclude that the tariffs before the Commission are noncompetitive. Ultimately, the Commission should order the reclassification of the tariffs before it as noncompetitive.

b. Legislative Packages Section 13-518

The Illinois General Assembly in Section 13-518 provided for three optional services packages. This Section's source was Public Act 92-22 and has been effective since June 30, 2001. The three packages in Section 13-518 are:

> (1) A budget package, which shall consist of residential access service and unlimited local calls.
>
> (2) A flat rate package, which shall consist of residential access service, unlimited local calls, and the customer's choice of 2 vertical services as defined in this Section.
>
> (3) An enhanced flat rate package, which shall consist of residential access service for 2 lines, unlimited local calls, the customer's choice of 2 vertical services as defined in this Section, and unlimited local toll service.
> 220 ILCS 5/13-518(a)(1), (2) and (3).

In deciding whether these packages are competitive or noncompetitive, the Commission needs to look no further then the Public Utilities Act. The legislature provided in the Act that the packages in Section 13-518 are noncompetitive and clearly stated that: "…The service packages described in this Section shall be defined as noncompetitive services…" 220 ILCS 5/13-518(d).

The Illinois Commerce Commission lacks the authority to allow the packages to remain classified as competitive where Illinois law provides that they are noncompetitive. Ultimately, the Commission's authority is limited to that provided by Illinois law. The Illinois Commerce Commission was created pursuant to what is now Section 2-101 of the Public Utilities Act. 220 ILCS 5/2-101. The duties and general powers of the Commission are described in Article 4 and elsewhere throughout the Public Utilities Act. 220 ILCS 5/4 et. al. As the Illinois Supreme Court has noted "…The sole power of the Commission stems from the statute, and it has the power and jurisdiction only to determine facts and make orders concerning the matters specified in the statute. (citation omitted)…" *Union Electric Company v. The Illinois Commerce Commission et al., Illinois Bell Telephone Company v. The Illinois Commerce Commission*, 77 Ill.2d 364, 383, 396 N.E.2d 510, 519 (1979).

The language in Section 13-518 is clear and to the point. The Commission should be consistent with that language and find that the packages are noncompetitive as a matter of law. With respect to statutory construction the Illinois Supreme Court stated in the case of *In re Estate of Herman J. Dierkes (Estate of Herman J. Dierkes, Appellee; The Department of Transportation, Appellant)*. 191 Ill. 2d 326, 331, 730 N.E.2d 1101 (2000):

> The cardinal rule of interpreting statutes, to which all other canons and rules are subordinate, is to ascertain and give effect to the intent of the legislature. In determining legislative intent, a court should first consider the statutory language. *King v. Industrial Comm'n, 189 Ill. 2d 167, 171, 244 Ill. Dec. 8, 724 N.E.2d 896 (2000); McNamee v. Federated Equipment & Supply Co., 181 Ill. 2d 415, 423, 229 Ill. Dec. 946, 692 N.E.2d 1157 (1998).* Specifically in construing the Act, all portions thereof must be read as a whole, and in such a manner as to give them the practical and liberal interpretation intended by the

> legislature. *McNamee, 181 Ill. 2d at 428; K. & R. Delivery, Inc. v. Industrial Comm'n, 11 Ill. 2d 441, 445, 143 N.E.2d 56 (1957).*

Further in the Illinois Supreme Court in *Western National Bank of Cicero, Trustee, et al., v. The Village of Kildeer et al.,* 19 Ill. 2d 342, 350, 167 N.E.2d 169 (1960) stated:

> It is a primary rule in the interpretation and construction of statutes that the intention of the legislature should be ascertained and given effect. (*Petterson v. City of Naperville, 9 Ill.2d 233; Belfield v. Coop, 8 Ill.2d 293.)* This is to be done primarily from a consideration of the legislative language itself, which affords the best means of its exposition, and if the legislative intent can be ascertained therefrom it must prevail and will be given effect without resorting to other aids for construction. (*People ex rel. Mayfield v. City of Springfield, 16 Ill.2d 609; Louis A. Weiss Memorial Hospital v. Kroncke, 12 Ill.2d 98.)* There is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute imports.

In considering the language of the statute, the Commission should conclude that plain meaning of the statute leads one to conclude that the 13-518 packages are noncompetitive as a matter of law.

A principle of statutory construction the Commission may consider was discussed by the Illinois Supreme Court in *Metzger v. DaRosa,* 209 Ill.2d 30, 44, 805 N.E.2d 1165 (2004) where the court noted that::

> The familiar maxim *expressio unius est exclusio alterius* is an aid of statutory interpretation meaning "the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990). "Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions ***." *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 442, 593 N.E.2d 522, 170 Ill. Dec. 633 (1992). This rule of statutory construction is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written. 2A N. Singer, Sutherland on Statutory Construction § 47.24, at 228, § 47.25 at 234 (5th ed. 1992).

Where the statute said noncompetitive, the Commission should not conclude that they somehow meant something else.

In the end with respect to certain packages, one of the only factual questions for the Commission to decide is which of the tariffs are being provided pursuant to Section 13-518. Which are the 13-518 packages is not something that has been contested in this case. ICC Staff witness Dr. James Zolnierek testified with respect to which packages are provided pursuant to Section 13-518 and stated:

> "…A. IBT currently provides: (1) a Residence Saver Pack Unlimited, provided since September, 4, 2001, pursuant to Section 13-518(a)(1) of the Act; (2) a Flat Rate Package, provided since August 12, 2002, pursuant to Section 13-518(a)(2) of the Act; and (3) an Enhanced Flat Rate Package, provided since August 12, 2002, pursuant to Section 13-518(a)(3) of the Act.[17] Each of these packages is described below…" (citation omitted)[1]
> ICC Staff Ex. 2.0 at 12-13 (Zolnierek).

In light of the legislature's creation of these three packages and the Act's classification of them as noncompetitive, the Commission is required to reclassify the three packages as noncompetitive. To the extent that AT&T is unhappy with the law, they need to seek change in the legislature. Until then consumers are entitled to those packages being offered as noncompetitive services.

The issue with respect to the legislative packages was also the subject to the People of The State of Illinois's Motion for Summary Judgment and Reclassification of

[1] Zolnierek cited to "IBT Response to Staff Data Request JZ 3.01."; footnote 17, ICC Staff Ex. 2.0 at 13 (Zolnierek).

Section 13-518 Packages. ICC 06-0027, e-docket March 23, 2006[2]. The Cook County State's Attorney's Office now adopts those arguments and joins in the Illinois Attorney General's Office's request and urges the Commission to grant the Attorney General's motion immediately.

c. Local Measured Service – Residential Access line and Usage (band A and B)

The record in this case should lead the Commission to conclude that there is no meaningful competition for consumers seeking a residential access line by itself and paying for usage ala carte. The access line classification should be reclassified as noncompetitive. Initially in the case, the only party advocating in testimony that the residential access line be declared competitive was AT&T Illinois. CUB later joined them in advocating this in their joint proposal. However, the CUB witness at the hearing on the joint proposal stood by their testimony. Clearly, the Commission needs to look at the record evidence in this case which includes CUB's earlier testimony on this issue.

Earlier in the case, CUB witness McKibbin also stated "…The Commission should order AT&T Illinois to reclassify its most basic services, Residential Local Usage and Residential Network Access Lines, as non-competitive under Section 13-502 of the Public Utilities Act. These services are not competitive in MSA 1…" Further, "…Wireless, cable, and VoIP services are not substitutes for Residential Local Usage and the Residential Network Access Line individually. Nor are they substitutes when taken together…" CUB Ex. 1.0 (McKibbin) at 43.

[2] There was also filed the People of the State of Illinois's Reply Regarding Their Motion for Summary Judgment and Reclassification of Section 13-518 Packages, ICC 06-0027, e-docket March 31, 2006. The CCSAO also supports the arguments made in the Illinois Attorney General's Office's reply.

Staff witness Dr. Genio Staranczak indicated that for the purposes of reclassification that the local measured service market is distinct from the bundled service market. ICC Staff Ex. 1.0 (Revised) (Staranczak) at 5, lines 100-129. See also AG Ex. 1.0 at 23.

Dr. Genio Staranczak works as the principal economist in the telecommunications division at the Illinois Commerce Commission. ICC Staff Ex. 1.0 Revised (Staranczak) at 1. Dr. Staranczak testified that local measured service is where "…A subscriber to local measured service will be billed separately for each network access line and billed separately for each local call the subscriber makes…" ICC Staff Ex. 1.0 Revised (Staranczak) at 4, lines 87-90. As noted by Dr. Staranczak there are not many competitors for local measured service. ICC Staff Ex. 1.0 at 8, lines 159-186.

Dr. Staranczak testified that "…According to figures provided by AT&T Illinois approximately 50% of residential subscribers in the MSA 1 are measured service subscribers [footnote omitted]. ICC Staff Ex. 1.0 Revised (Staranczak) at 5, lines 97-98. Dr. Staranczak noted that for the purposes of this proposed reclassification that the local measured service market is different than the bundled service market. ICC Staff Ex. 1.0 Revised (Staranczak) at 5, lines 100-111. Dr. Staranczak summarized his conclusions in the measured service market and stated:

> "…AT&T Illinois' own filing indicates that there are, at best, one or two less than active competitors in the measured service market, and these competitors provide service to just a few customers. Although there are a number of competitors offering bundled services, these packages along with the packages marketed by

> AT&T Illinois are not viable economic substitutes for measured service. This is because the packages, cost at least 50% more per month than a low volume user who makes a hundred local calls or less a month would pay for access and local usage (and 15% or more per month than a measured service user who also subscribes to a vertical feature would pay a month) VoIP telephony is only available to the less than 50% of households who subscribe to broadband, and can be more expensive than measured usage rates offered by AT&T Illinois (assuming the average local call is three minutes in length). Wireless service providers do offer limited forms of measured service, but at rates 1,500% higher than those charged by AT&T Illinois. Finally, resale is not facilities based competition and consequently will not act to constrain ILEC measured service prices…" ICC Ex. 1.0 (Staranczak) at 14-15, lines 282-300.

The Commission should adopt the viewpoint of Dr. Staranczak with respect to measured service. Dr. Staranczak's testimony showed how measured service failed to satisfy the Public Utilities Act. As noted by Dr. Staranczak:

> My analysis clearly demonstrates that measured service subscribers are an identifiable and distinct class of users for PUA Section 13-502(b) purposes. Furthermore, given the evidence to date, my examination establishes that measured service fails to satisfy any of the competitive criteria listed under Section 13-503(c) [sic] of the PUA. In particular: (1) as I have shown above, there are effectively no landline measured service competitors in MSA-1; (2) bundled services and wireless services are not readily substitutable for measured service because they are not offered at comparable rates; (3) current UNE and measured service pricing acts as an effective barrier of entry into the measured service market; (4) the only price constraining competition that is likely emerge is UNE based (i.e. it relies upon the service of an existing ILEC;) and (5) the public interest is not served by an immediate reclassification of measured service because an immediate reclassification will give AT&T the ability to simply raise rather than rebalance measured service rates. ICC Staff Ex. 1.0 (Staranczak) 16, lines 325-338.

As noted by Dr. Selwyn with respect to whether AT&T Illinois faces any competitive pricing constraints for its stand alone basic access line:

> No. Given that CLECs are only competing for customers that purchase services from a different product market, i.e. bundles of

> services priced anywhere from $20 and up, IBT faces little if any competitive price pressure for its *stand-alone basic local access line* service that customers are purchasing for $7.05 to $13.50.
> AG Ex. 1.0 (Selwyn) at 31, lines 6-9.

The record in this case shows clear issues with respect to competition with respect to the access lines and usage. Other than AT&T Illinois, there was initially no other party that contends that a stand-alone basic access line should be competitive based on the actual evidence in their testimony. While CUB supports the competitive declaration in their testimony in support of the Joint Proposal, the CUB witness at the hearing stood by their earlier testimony in the case. However, these customers will be subjected to the possibility of rate increases under the joint proposal. The Commission should reject AT&T's contentions in this area and reclassify the local access line and local measured usage. Clearly, the access line should remain noncompetitive and subject to alternative regulation.

d. Packages

A more challenging area involves packages offered in MSA1. The CCSAO notes that there are competitors offering packages of services to consumers in MSA1. AT&T Illinois presented testimony that packages were properly classified as competitive. Dr. James Zolnierek, who testified on behalf of the ICC Staff, was of the opinion that AT&T had properly reclassified residential local service packages in MSA1 as competitive. ICC Staff Ex. 2.0 at 90-96, ICC Staff Ex. 9.0 at 4.

However, Data Net Systems witness Joseph Gillan concluded that: "The Commission should deny AT&T Illinois' request for a competitive classification of its

residential services in the Chicago LATA." Data Net Systems Ex. 1.0 (Gillan) at 39, lines 24-27.

Dr. Selwyn indicated in his testimony that bundled services and service packages were not sufficiently competitive to warrant reclassification at this time. AG Ex. 1.0 (Selwyn) at 52, lines 1-15.

While the issues with respect to packages are a closer call, the CCSAO contends that AT&T Illinois has not met its burden of proof showing that the market is competitive within the meaning of the Public Utilities Act. Further, the Commission should not consider VoIP or Wireless services as the functional equivalent at this time. With respect to the Act, we further urge the Commission to use its discretion and find that given the lack of facilities based providers that AT&T Illinois has not met its burden of proof.

e. Caller ID and Call Waiting

The Public Utilities Act specifically addresses caller identification and call waiting. In Section 13-502.5 in general dealing with services alleged to be improperly classified the section provided that:

> "…All retail vertical services, as defined herein, that are provided by a telecommunications carrier subject, as of May 1, 2001, to alternative regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall be classified as competitive as of June 1, 2003 without further Commission review. Retail vertical services shall include, for purposes of this Section, services available on a subscriber's telephone line that the subscriber pays for on a periodic or per use basis, but shall not include caller identification and call waiting…"
> 220 ILCS 5/13-502.5(c).

An issue before the Commission is whether caller ID and call waiting can be declared competitive in light of the above language. Clearly, the legislature signaled out caller ID and call waiting for different treatment when it made the various other vertical services competitive. Section 13-502.5 also provides that "…All other services shall be classified pursuant to Section 13-502 of this Act…" 220 ILCS 5/13-505.5(f).

It is a little unclear under the Public Utilities Act where this leaves Caller ID and call waiting. Yet, the legislature chose at that time to leave Caller ID and call waiting as noncompetitive services. Further, Section 13-502.5(f) appears to remove caller ID and call waiting from the scope of Section 13-502. AT&T should be required to first demonstrate that caller ID and voice mail can even be reclassified in light of the statement in Section (f). Absent legislation, these should be classified as noncompetitive.

However, it is unnecessary to reach the legal issue if the Commission adopts the CCSAO view that all the other tariffs in the case should be reclassified as noncompetitive. Turning to the record in this case, the Commission should adopt the opinion of its Staff member Dr. Genio Staranczak who was of the opinion that caller ID and call waiting is not competitive for measured service users. ICC Staff Ex. 1.0 (Revised) (Staranczak) at 17, lines 350-368.

Ultimately, if one concludes that the law allows reclassification with respect to caller ID and call waiting in packages, their classification should go with the line. Since the CCSAO contends that the various reclassifications for the access lines and packages were contrary to the Public Utilities Act and should be reclassified as

noncompetitive then similarly caller ID and call waiting should follow those classifications and also be declared noncompetitive.

f. Public Interest

One of the facts that the Commission is required to consider is "any other factors that may affect competition and the public interest that the Commission deems appropriate…" 220 ILCS 5/13-502(c)(5). Clearly, the uncertainty created by the pending challenge to Illinois UNE provisions is a factor the Commission needs to consider[3].

In looking at the public interest, the Commission should consider its alternative regulation plan and the how this will be affected. One of the consequences that results from a competitive declaration is that any services declared competitive will be no longer subject to the Commission's Alternative Regulation plan for AT&T Illinois. As noted by Dr. Selwyn "Because the annual rate of inflation has generally been less than the so-called "X Factor" or productivity offset factor adopted in that proceeding, services subject to the price cap have been experiencing a succession of annual rate reductions for more than a decade." AG Ex. 1.0 (Selwyn) at 11, Lines 21-23. Therefore, any of these services that remain classified as competitive will not be subject to the Alternative Regulation formula which has lead to rate reductions. In considering the public interest, the Commission should ensure that ratepayers are protected by the Alternative Regulation plan until such time as there is competition within the meaning of the Public Utilities Act.

[3] Illinois Bell Telephone Company v. Hurley et al. 2005 U.S. Dist. LEXIS 6022, (N.D. IL, March 29, 2005).

With respect to the public interest, CUB witness McKibbin noted "…Further, the public interest demands that AT&T's Residential Local Usage and the Residential Network Access Line remain regulated until customers, who need basic telephone service to contact emergency services, jobs, and schools, enjoy robust competition…" CUB Ex. 1.0 (McKibbin) at 3.

The Commission should consider where the reclassification would leave consumers and prices. Further, as noted with respect to the public interest by Dr. Selwyn, "…The statutory requirements for reclassification of residential services in MSA-1 have not been satisfied, and reclassification at this time is clearly not in the public interest…" AG Ex. 1.0 at 10, lines 20-21.

g. Joint Proposal

The CCSAO contends that the Commission should reject the AT&T Illinois and CUB joint proposal. The CCSAO has no objection to the rate decreases in the joint proposal. Further, to the extent that AT&T Illinois wants to voluntarily fund a consumer education fund – we have no objection. However, we do object to how the joint proposal treats the competitive reclassifications. The CCSAO contends that the reclassifications should be reversed and therefore the joint proposal should be rejected.

Since there is not unanimous support of all the parties in the case for the joint proposal, then the Commission needs to comply and proceed based on record evidence consistent with *Business and Professional People for the Public Interest et al*. See *Business and Professional People for the Public Interest et al., v. The Illinois Commerce Commission et al.,* 136 Ill. 2d 192, 216-217, 555 N.E.2d 693 (1989) where the Illinois Supreme Court has stated that unanimous support is required for settlements. If not, then the Commission must make an independent finding supported by the record as a whole that the proposal is supported by substantial evidence.

Turning to the record at a whole, the CCSAO contends that the Commission should reject the joint proposal. Only AT&T Illinois and CUB were parties to the joint proposal and they both filed testimony in support of the proposal. AT&T Illinois Ex 1.4, 1.5 (Wardin), CUB Ex 5.0, 6.0 (McKibbin). While CUB provided testimony supporting the joint proposal, their original testimony in the case still remains in the record.

Dr. Selwyn testified in opposition to the joint proposal on behalf of the Illinois Attorney General's Office, the CCSAO, the City of Chicago and AARP. AG Ex 1.2

(Selwyn). Dr. Selwyn testified that the settlement as presented is not in the public interest. AG Exhibit 1.2 (Selwyn) at 2, lines 13-23. Dr. Selwyn also testified:

> The testimony and other evidence offered in support of the settlement compels the conclusion that meaningful *and independent* competition – i.e., competition that is not wholly or substantially dependent upon IBT wholesale services – simply does not exist at this time, and that reclassification of residential services in MSA-1 to the "competitive" category is premature and certainly not in the public interest. AG Ex. 1.2 (Selwyn) at 46, lines 6-10.

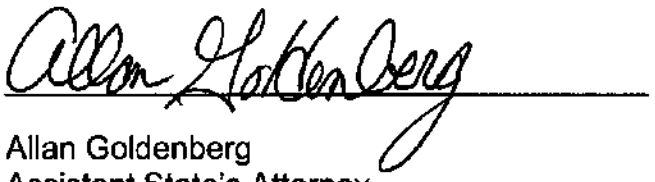
Ultimately, a review of the record leads ones to the conclusion that the joint proposal should be rejected.

IV. Conclusion

The Cook County State's Attorney's Office respectfully requests that the Illinois Commerce Commission reverse the reclassification of the tariffs that are the subject matter of this case and order them to be classified as noncompetitive. We urge the Commission to take all necessary action to accomplish the reclassification.

Respectfully submitted,

RICHARD A. DEVINE,
STATE'S ATTORNEY OF COOK COUNTY

June 16, 2006 By: 

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